

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SAMUEL FETCHERO and ALLISON
FETCHERO,

Plaintiffs,

v.

AMICA MUTUAL INSURANCE
COMPANY, a foreign insurance company,

Defendant.

CASE NO. 2:22-cv-400

ORDER ON PLAINTIFFS' MOTION TO
COMPEL, AND DEFENDANT'S MOTION
FOR AN EXTENSION AND MOTION FOR
A PROTECTIVE ORDER

This is an insurance bad faith action brought by Plaintiffs Samuel and Allison Fetchero against their insurer, Defendant Amica Mutual Insurance Company. Pending before the Court are several related discovery motions: the Fetcheros moved to compel production of notes evaluating loss reserves from Amica's insurance claim file, while Amica moved for a protective order barring the Fetcheros from deposing two of its employees, one of whom authored the loss reserve evaluation. Dkt. Nos. 36, 39. Because Amica's motion for a protective order came after the Court's deadline for discovery motions, Amica moved to extend the deadline for considering such motions. Dkt. No. 38.

Having reviewed the motions and supporting documents, the Court DENIES the Fetcheros' motion in part and ORDERS Amica to provide the claim file notes in question to the

1 Court for *in camera* review. The Court reserves ruling on the remaining motions until after it has
2 conducted its *in camera* review.

3 BACKGROUND

4 On April 5, 2016, an underinsured driver rear-ended Plaintiff Samuel Fetchero. Dkt. No.
5 27 at 2. Fetchero alleges he suffered multiple injuries including a mild traumatic brain injury.
6 Dkt. Nos. 27 at 2 ¶ 9; 36 at 3–4. Fetchero’s spouse, Plaintiff Allison Fetchero, alleges loss of
7 consortium. Dkt. No. 27 at 2 ¶ 10. The Fetcheros settled their claims against the at-fault driver
8 for \$100,000—the full limits under her insurance policy. *Id.* ¶ 11. They then sought the full
9 \$1,000,000 policy limit under their Underinsured Motorist (“UIM”) policy with Amica. *Id.* at 3 ¶
10 16; Dkt. No. 36 at 6. Amica offered to settle the Fetcheros’ claims for \$25,000. *Id.* ¶ 20. The
11 Fetcheros bring breach of contract, bad faith, and Washington Insurance Fair Conduct Act
12 claims. *Id.* at 4–6 ¶¶ 28-42.

13 The Fetcheros’ discovery motion centers on a document created by Amica’s associate
14 claim examiner, Alex Rottler. On June 28, 2021, Rottler posted a 34-page evaluation of their
15 insurance claim and request to increase the loss reserves completed by Amica’s associate claims
16 examiner, Alex Rottler, on June 28, 2021. Plaintiffs allege that Rottler failed to regularly review
17 the Fetcheros’ claim file and to reevaluate Amica’s loss reserves—Amica’s estimate of the value
18 of the Fetcheros’ claims—based on new information; instead, Rottler maintained the loss
19 reserves at \$20,000 for over two years before reevaluating and recommending an increased range
20 of \$300,000 to \$500,000 on June 28, 2021. *Id.* at 8–9. Amica approved Rottler’s loss reserve
21 evaluation on July 2, 2021. *Id.* at 9. The Fetcheros argue that the loss reserve information is
22 relevant to their bad faith insurance claims.

1 Plaintiffs moved to compel production of Amica’s complete, unredacted claim file notes
2 from June 28 and July 2, 2021.¹ Dkt. No. 36 at 2.

3 The issue raised by Amica’s motion involves Plaintiffs’ depositions of Amica’s senior
4 claim manager, Steve Peloquin, and Rottler on June 5, and June 7, 2023, respectively. *See* Dkt.
5 No. 52 at 4. Each deposition lasted five hours. Dkt. No. 39 at 11. Plaintiffs argue they reserved
6 the right to “call back” Rottler and Peloquin for another two hours, relying on an email exchange
7 in which Amica’s counsel stated as follows:

8 We can do Mr. Peloquin on 6/5 and Mr. Rottler on 6/7, but with the time difference,
9 a 7-hour block is difficult. We can offer 8 or 9 till 2 our time (11 or 12 till 5 their
10 time), which would get you up to six hours. If you have a little bit more, I imagine
we can stay over a little. If you have a good chunk more, we can arrange for a short
second session.

11 Dkt. No. 52 at 4. Plaintiffs did not request a second deposition of Peloquin or Rottler
12 immediately after completing their initial depositions.

13 On June 28, 2023, Amica provided the Fetcheros with a complete privilege log, which
14 contained “a new version of the claim file notes that removed the redactions to reveal the subject
15 line, author, date, and other information for all notes” Amica identified as privileged. Dkt. No.
16 39 at 4. The same day, Plaintiffs’ counsel emailed Amica’s counsel stating, “[i]n light of the
17 partially unredacted portions of the claim file, I will need to call back Mr. Rottler and Mr.
18 Peloquin to finish their depositions.” Dkt. No. 39-1 at 64. Amica moved for a protective order to

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20 ¹ Plaintiffs also moved for an order commanding Defendant to “make available its Fed. R. Civ.
21 P. 30(b)(6) designee to testify about the additional documents at [Defendant’s] expense[.]” Dkt.
22 No. 36 at 2. But Plaintiffs do not expound upon this request in their motion, nor do they explain
why a second deposition is justified. *See generally id.* Therefore, their request to re-depose
Defendant’s Fed. R. Civ. P. 30(b)(6) representative is DENIED.

23 Additionally, Plaintiffs requested an order removing the confidential designations from certain
24 training materials, Dkt. No. 36 at 2, but the parties resolved the issue among themselves and
Plaintiffs no longer seek this relief. Dkt. Nos. 40 at 1; 42 at 7–8. The Court considers this aspect
of their motion withdrawn.

1 bar Plaintiffs from further deposing Rottler and Peloquin, arguing their agreement to schedule a
 2 second session had expired by the time Plaintiffs requested it, and that the value of any further
 3 testimony would be negligible given that the notes are covered by work-product protection. *See*
 4 Dkt. Nos. 39 at 7–8; 54 at 3.

5 The Court now addresses the pending motions.

6 DISCUSSION

7 **I. The claims file notes are “dual-purpose” documents. The Court must review 8 them *in camera* to determine whether work-product protection is warranted.**

9 Parties may obtain discovery regarding any non-privileged matter that is relevant to any
 10 party’s claim or defense and proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).
 11 Information need not be admissible at trial to be discoverable. *Id.* Courts are split about whether
 12 loss reserve information is relevant in bad faith cases against insurance companies. *See, e.g.,*
 13 *Schreib v. Am. Fam. Mut. Ins. Co.*, 304 F.R.D. 282, 285 (W.D. Wash. 2014) (collecting cases).
 14 Plaintiffs assert that loss reserve information is relevant to their claims, and the Court agrees that
 15 this information may have some tendency to prove or disprove their claims. *See* Fed. R. Evid.
 16 401. Amica does not challenge the relevancy of the loss reserve information, so the Court will
 17 not analyze its relevance further, and will instead focus on whether this information is protected
 18 by the work-product doctrine, which is the focus of Amica’s argument.

19 Amica argues the work-product doctrine shields from discovery Rottler’s notes about loss
 20 reserve information because they were made in anticipation of litigation. Dkt. No. 40 at 8.
 21 Specifically, Amica asserts that work-product protection was triggered on June 5, 2021, when
 22 Plaintiffs’ attorney told Amica’s claims adjuster that they would be filing a Washington
 23 Insurance Fair Conduct Act (“IFCA”) claim against Amica. *Id.* at 9–10. Plaintiffs argue the
 24

1 notes were made in the ordinary course of business so they do not qualify as work product. Dkt.
2 No. 36 at 13–14.

3 “Work product is a qualified immunity protecting a party from discovery of documents
4 and tangible items prepared by a party, or the party’s representative, in anticipation of litigation.”
5 *Swinerton Builders v. Lexington Ins. Co.*, No. 2:21-CV-259-RAJ-TLF, 2022 WL 1689708, at *2
6 (W.D. Wash. May 26, 2022) (citing *Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947); Fed. R.
7 Civ. P. 26(b)(3)). When a document serves a dual purpose—meaning it was not prepared
8 exclusively for litigation—then courts apply the Ninth Circuit’s “because of” test. *United States*
9 *v. Richey*, 632 F.3d 559, 568 (9th Cir. 2011). Under this test, courts must consider the totality of
10 the circumstances to determine whether the “document was created *because of* anticipated
11 litigation, and would not have been created in substantially similar form but for the prospect of
12 litigation.” *Id.* (emphasis added) (citing *In re Grand Jury Subpoena, Mark Torf/Torf Envtl.*
13 *Mgmt.*, 357 F.3d 900, 907 (2004)).

14 Because insurers in Washington state are required by statute to maintain loss reserves in
15 the ordinary course of business, loss reserve documents are not prepared exclusively for
16 litigation. *Barge v. State Farm Mut. Auto. Ins. Co.*, No. C16-0249JLR, 2016 WL 6601643, at *6
17 (W.D. Wash. Nov. 8, 2016); *see also* RCW 48.12.030(2), .090. Thus, courts look to the “because
18 of” standard to determine whether work-product protection is warranted. *See, e.g., Schreib* at
19 286; *Barge*, 2016 WL 6601643, at *6.

20 Neither party squarely addresses the proper standard for deciding this issue. Amica
21 argues that the date on which Plaintiffs announced their intention to file an IFCA notice (i.e.,
22 June 5, 2022) is dispositive and that all documents generated after this date are protected work-
23 product. Amica argues that the court’s decisions in *Schreib* and *Barge* are “precedential law” that
24 dictate this outcome, but Amica reads these cases too narrowly as neither one adopts a brightline

1 rule conferring work-product protection upon loss reserve information generated after an IFCA
2 notice is received or becomes imminent. For instance, in *Schrieb*, the Court expressly found that
3 the insurer’s receipt of the IFCA notice “does not end the [work-product] inquiry” given that loss
4 reserves are prepared in the ordinary course of business, and thus, dual nature. 304 F.R.D. at 286.
5 Likewise, in *Barge*, although the court ultimately found that the loss reserve documents prepared
6 by the insurer after receipt of the plaintiff’s IFCA notice were protected by the work-product
7 doctrine, the court recognized the dual-purpose nature of the documents and conducted an *in*
8 *camera* review to determine whether, under “the totality of the circumstances,” the disputed
9 documents were “‘fairly said to have been prepared or obtained because of the prospect of
10 litigation.’” 2016 WL 6601643, at *6 (quoting *Richey*, 632 F.3d at 567).

11 Thus, the mere fact that an IFCA notice has been received or an intent to file one has
12 been disclosed, does not necessarily rob the claims file of its dual-purpose nature or relieve the
13 Court of its obligation to review the documents to determine whether they were created in
14 anticipation of litigation or in the ordinary course of business. *See Young v. Safeco Ins. Co. of*
15 *Am.*, No. 20-CV-01816-LK, 2022 WL 1061940, at *2 (W.D. Wash. Apr. 8, 2022) (“Because it is
16 easy to imagine many scenarios in which an insurance company continues to adjust a claim after
17 suit is filed or after an IFCA Notice is received, the mere fact that suit has been filed or an IFCA
18 Notice has been received does not foreclose a court from evaluating whether a given document
19 or communication serves a dual purpose.” (cleaned up)).

20 The Fetcheros argue that the documents were created in the ordinary course of business,
21 relying primarily on Rottler’s deposition testimony that Amica trained him to periodically review
22 the loss reserves and that he would have done so regardless of the prospect of litigation.

1 The Court cannot rule on this issue without viewing the documents in question. In light of
2 the work-product protection standards, the Court determines that *in camera* review of the
3 disputed documents is appropriate.

4 **II. The Court does not consider the remaining motions.**

5 The Court declines to rule on the remaining aspects of Plaintiffs' motion to compel and
6 Defendant's motion to extend the deadline for discovery motions and for a protective order until
7 after it has conducted *in camera* review of the claims file.

8 **CONCLUSION**

9 Accordingly, the Court DENIES the Fetcheros' motion in part and ORDERS Amica to
10 provide the claim file notes in question to the Court for *in camera* review within seven (7) days
11 of the date of this order. The Court reserves ruling on the remaining motions until after it has
12 conducted its *in camera* review.

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14 Dated this 20th day of September, 2023.

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Jamal N. Whitehead
17 United States District Judge
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